

DISCIPLINE & BEHAVIOR MANAGEMENT UNDER IDEA & SECTION 504:

Presented by David M. Richards, Attorney at Law

RICHARDS LINDSAY & MARTIN, L.L.P.

13091 Pond Springs Road • Suite 300 • Austin, Texas 78729

Telephone (512) 918 -0051 • Facsimile (512) 918-3013 • www.504idea.org

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A note about these materials: These materials are not intended as a comprehensive review of all case law, rules, and regulations on discipline and behavior management under the IDEA and Section 504, but as a survey of the common questions raised by educators on these issues. The answers provided to these common questions are crafted to recognize the modern campus discipline dynamic, including the growing shift in intervention strategy to a more robust regular education response. In places, these materials focus more on the relationships and dynamics arising from the various rules than on the rules themselves. The purpose of these materials is to encourage understanding of the hard realities faced by educators as they handle discipline and behavior management issues. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation.

While the author is a licensed attorney and prepared to discuss the legal issues arising from special education behavior management and discipline, he has turned to educators and researchers for much of the educational and behavioral data and thought relied on in these materials. Occasional references will be made to *RTI and Behavior: A Guide to Integrating Behavioral and Academic Supports*, Jeffrey Sprague, Clayton R. Cook, Diana Browning Wright, and Carol Sadler, LRP Publications (2008) [hereinafter "*RTI & Behavior*"]. The author encourages the reader to spend some time with this excellent resource to further flesh out the ideas summarized here. Internal citations to supporting studies in these materials are omitted here to keep the narrative somewhat uncluttered. Throughout these materials, the U.S. Department of Education will be referenced as "ED." Rules apply equally to Section 504 and IDEA unless otherwise noted.

I. A Little Context: Understanding the Campus Behavior & Discipline Dynamic

A. The inevitable tension between an ordered campus and LRE

Discipline of disabled students will, at some point, invariably create a conflict between two sets of equally valid educational policies: (1) a school's responsibility to maintain a safe learning environment, and (2) a school's federal statutory duty to provide a free appropriate public education to students with disabilities, including those whose disabilities involve significant behavioral disturbances. This collision of policies is always just around the corner when dealing with behavioral problems of disabled students, and it adds a measure of complexity to every major disciplinary situation involving disabled students. Few topics in special education generate as much debate and comment as the application of disciplinary rules to IDEA-eligible students. This is the reason why in 1997 the Congress saw fit to include in the IDEA specific provisions addressing discipline of IDEA students. *See* 20 U.S.C. §1415(k).

The balance between protecting the right to a FAPE by preventing arbitrary and discriminatory application of disciplinary rules on the one hand, while also affording schools the necessary discretion in implementing locally-designed disciplinary policies to maintain a safe learning environment, is still in evolution. *See* Congressional Research Service (CRS) Report for Congress, at p. 29. The persistence of the debate resulted in significant legislative attention to the issue in the 2004 reauthorization. The

Congress also showed early that it was more than willing to undertake reform of the discipline provisions. The House of Representatives, for example, passed an IDEA bill that would have essentially repealed the manifestation determination requirement, allowing schools to use regular disciplinary procedures for removals of up to 45 days, or longer if state law so required. The Senate's IDEA bill revised its language, but retained the manifestation determination requirement as a fundamental component of disciplinary actions under the Act. The bills demonstrated that the issue was among the most hotly debated in the legislative process leading up to reauthorization.

B. The Major Players on the Modern Campus (and some of the things that may motivate them).

In the author's opinion, *and at the risk of over-simplifying the complexities of the modern public school campus*, the following conclusions are a summary of the changes faced by the major players in campus discipline and behavior over the past 20-30 years.

1. Students. Compared to students 20 or 30 years ago, today's students are more savvy, may have less direct parental supervision during after-school hours, less accountability to parents for school performance, and less motivation to attend and complete school work. Consequently, some "old school" disciplinary techniques won't work as well as they did years ago. Suspension, expulsion and reliance on the student's parents to reinforce school discipline don't work as well in an environment where students frankly may not want to attend school and do school work and in which parents may have little time, desire or influence to change things.

2. Parents. Compared to parents 20 or 30 years ago, today's parents are sometimes less-involved in their children's lives on a day-today basis, less trustful of government and school authority, and more likely to challenge or criticize school efforts to discipline their student than support it. Ironically, a major disciplinary incident may be the trigger to suddenly force some parents to focus attention on a long-simmering behavior problem with their student, and, like the cavalry, ride to the rescue to prevent natural consequences of school misbehavior out of a sense of guilt due to the lack of previous attention and involvement. Keep these thoughts in mind:

- Parents will sometimes lash out at your actions *even if they know the child is wrong and the school's response is appropriate.*
- Parents want respect for themselves and their kids.
- Administrative convenience is usually not perceived by parents as a good reason for anything.
- Some parents are intimidated by teachers, principals and other educators, and are reluctant to raise issues directly with school personnel. They are not reluctant to have attorneys raise the issue for them.
- Parents sometimes want what they think is best for the child, *not what's fair or right.*
- Some parents may never realize that their view of their child is incorrect. Nothing you can do or say will change that.
- Parents want to see your concern for their kids.
- Parents vote for board members, patronize businesses owned by board members, and complain directly to board members even when they know they shouldn't.

3. Teachers. Compared to teachers 20 to 30 years ago, today's classroom teachers have less autonomy with respect to instruction (state mandated curriculum controls that), more accountability for student performance due to the state assessment (and its over-emphasis as *the* accurate measure of student success) and receive less respect and support from parents and the community. Changes, especially those involving RTI, are often viewed warily, as additional things to do in an already over-crowded day, with no additional time, money or help to accomplish the new tasks.

4. Campus Administrators. Compared to campuses 20 or 30 years ago, today's campus administrators address serious student behavior issues in greater numbers and severity on a day-to-day basis in an atmosphere of less student respect for authority and less support from parents. Due to efforts by the most state legislatures, schools now educate students who 20 to 30 years ago would not have been allowed on campus due to their behaviors. Consequently, public educators often ignore or allow emerging behavior issues to build as they focus their limited resources on major behavioral concerns that interfere with the ordered learning environment and the pursuit of AYP. Finally, too often campus administrators rely heavily on disciplinary techniques like school removals that, while providing some peace and relief to staff and the school environment, do not tend to change behavior and may spawn more serious academic and behavior problems (see discussion below).

B. "Old School" Thinking in a "New School" World

Any attempt to understand why behavior management and disciplinary techniques work or don't work must recognize the changes outlined above. There are many moving pieces in this dynamic, and the better each piece and its movement are understood, the better the resulting performance of the campus, and the less-frequent the calls to counsel on troublesome situations. **Interestingly, modern behavior management thinking, summarized below, rejects the over-reliance on removals (based on data showing ineffectiveness) that IDEA & Section 504 restrict due to concerns over discrimination and denial of FAPE.**

C. Some common foundational questions asked by educators

Question #1. Why is discipline of students with disabilities different from discipline of nondisabled students? The essence of discrimination is excluding students from school because of behavior related to disability. In its introduction to the IDEA (20 U.S.C. §1400, et. seq.), Congress made clear its desire that public schools serve children suffering from severe disabilities to ensure that they receive an appropriate public education. In its finding made at the time the original law was passed, Congress estimated that more than half of the roughly eight million children with disabilities in the United States [in 1976] were not receiving "appropriate educational services which would enable them to have full equality of opportunity." **One million of the "children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers."** 20 U.S.C. §1400(b)(4). And why were many of those students excluded from school? Because (1) they had disabilities affecting behavioral controls (emotional disturbances, ADD, ADHD, etc), (2) and they did things because of those disabilities affecting behavioral controls that violated student codes of conduct and were expelled. In essence, many were excluded from school for lengthy periods of time for having disabilities that affected behavioral controls.

Manifestation determination is designed to identify those situations where removal will be discriminatory on the basis of disability. As early as 1981, the Fifth Circuit held (under both IDEA and §504) that expulsion or other changes in placement are proper disciplinary tools for disabled students, if their behavior was unrelated to their disability. *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 566, 454 U.S. 1030. Since 1981, other federal courts that have encountered the issue are generally uniform in their support of the *Turlington* decision, at least insofar as it establishes that a disabled student's placement may be changed for disciplinary reasons if the behavior is properly found to be unrelated to the disability.

Question #2. Why don't students with disabilities have to face the consequences of their behavior like nondisabled kids? This is a common question when an administrator is told that the behavior is related to disability and that no long-term removal will be possible. The question reflects the frustration of not being able to implement the desired sanction. The underlying point, however, is important. Appropriate consequences and response to misbehavior is necessary to discourage or

prevent future recurrence. **That the preferred sanction is not available does not mean that consequences are avoided—it means that one option is off the table.** The key is to look at the available options and identify a response that, for this child, will have the desired effect on behavior. That’s where evaluation data and good IEP Team discussion can help to identify appropriate positive behavioral supports, together with appropriate disciplinary sanctions.

Question #3. Why is special education always telling me, the campus principal, what NOT to do? Can’t you help me solve this problem? Strangely, the classic regular education response ignores the fact that IDEA limitations on discipline focus almost exclusively on disciplinary removals from the student’s educational placement. Before-school detention, after-school detention, Saturday school, loss of privileges, and anything else that is not a removal is available for use with the student with disability. On some campuses, however, the removal is the sanction of choice.

The second question should be an area of focus for special education departments. Special educators do tell administrators what not to do and expect them to respect the IDEA restrictions on removals. After saying no, special educators should respond through the IEP process by discussing the situation, gathering additional data if necessary, and proposing changes to behavior management and supplementary aids and services to help the campus address the student’s behavior. Interestingly, IDEA was created not only to get student with disabilities in school, but also to ensure that they received appropriate services once there. The Fifth Circuit explained: **“Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs.”** *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1038 (5th Cir. 1989). Just as services must be provided to help a student with a learning disability access the regular classroom, so too are behavioral interventions required for a student with a disability impacting behavior to give him access to the classroom (and help him retain that access). Merely being “deposited” in the mainstream classroom without adequate supports to address his behaviors raises the distinct prospect of long-term disability-related removals from the educational setting for violation of student codes of conduct.

Some educators distinguish between students with educational or learning issues and those with behavioral issues. For many reasons (including the obvious) students with cognitive impairments are thought of with more compassion by most educators than students with impairments that give rise to behavior. Further, the need for changes to instructional techniques and extra supports make sense for students with cognitive impairments, but the logic of “disability creates need for services” doesn’t seem to resonate at the same level when the impact of disability is behavior rather than a student’s inability to grasp grade-level curriculum.

II. Preparing for the behavior of the special education student

A. Campus-wide behavior management for all students

In the 2004 Re-authorization of IDEA, Congress allowed schools to abandon the discrepancy model and move to RTI or choose another system to determine eligibility for students with a learning disability. That change has encouraged the already growing movement in regular education to address needs early to prevent far more difficult and expensive intervention later. While much attention has been paid to three tier models of intervention to address academic deficiencies, a similar approach to address behavioral issues is growing increasingly popular in public schools. The following paragraphs were selected from educational literature to provide a flavor of how behavioral issues can, and are being addressed, through research-based interventions.

1. The RTI model as applied to campus-wide behavior

a. **When it comes to behavioral interventions, early is better than late.** “An RTI model for behavior provides a fix for many of the problems inherent in the traditional model of service delivery. **Perhaps the most significant limitation of the traditional model of service delivery is that it is reactive in addressing challenging behavior rather than proactive.** The result is a ‘wait-to-fail’ approach, whereby students (and their teachers) must struggle for a long period of time before they are assessed and provided assistance. This means that **educators generally do not spring into action until the student’s problems are pronounced and have been present for an extended period of time.**” *RTI & Behavior*, p. 7 (emphasis added).

“Under the traditional model, students are assumed to be performing well academically and behaviorally unless identified otherwise. **The end result of this reactive approach is that many students fall through the cracks or develop deep-seated academic and behavioral problems that are resistant to remedial interventions and supports.** Also, the traditional model of service delivery does not support the success of all students. It is exclusive in the sense that only those students who pass through the first gate—referral for problems—are even considered for psychological evaluation or extra behavioral support. This is especially problematic in light of the research that indicates ‘teachers are imperfect tests’ for identifying students for support.” *RTI & Behavior*, p. 7 (emphasis added).

“**Evidence-based best practice for supporting these students begins with identifying problems early, whether the problems are academic, emotional, behavioral, or interpersonal.** After identification, interventions become essential to addressing the problem directly and thus reducing the obstacles to successful school adjustment. If appropriate educational and behavioral supports were more widely provided, the long-term benefits would greatly exceed the costs.” *RTI & Behavior*, p. 2 (emphasis added).

b. **How does RTI for behavior work? Very much like RTI for academics.** “The RTI approach to behavior support uses the identical three-tiered logic that has been adopted for literacy, and this ultimately simplifies the work of schools in both realms—academic and behavioral.” *RTI & Behavior*, p. 3.

“**In its simplest expression, RTI involves documenting a change in behavior as a result of intervention.** For example, the learner, while being provided with a particular level of instruction and support in an academic area, is periodically assessed and receives continued instruction and support that is adapted or intensified, depending on the assessment results. Similarly, **a student who displays challenging behaviors is also repeatedly assessed, and, based on the results, the school staff used scientifically validated practices to support the student in reducing those challenging behaviors and improving attitudes toward engagement in academic and social life.** Once a student demonstrates an inadequate response to a series of intensifying interventions, the student can and should be given more intensive academic and/or behavioral support. This may include determining special education eligibility and related services, among other options.” *RTI & Behavior*, p. ix (emphasis added).

“**Universal interventions, applied at the primary prevention level to all students in the same manner and degree, are used to keep problems from emerging.** Some good examples of such interventions include (a) developing a schoolwide discipline plan; (b) teaching conflict resolution and violence prevention skills to everyone; (c) establishing high and consistent academic expectations for all students; and (d) using the most effective, research based methods for teaching beginning reading in the primary grades and supporting all students’ reading performance throughout their school careers.” *RTI & Behavior*, p. 2 (emphasis added).

“Individualized interventions, applied to one student at a time or to small groups of at-risk individuals (e.g., alternative classrooms or ‘schools within schools’) are used to achieve secondary and tertiary prevention goals. Chronically at-risk students ‘select’ themselves out by not responding well to primary prevention and need more intensive intervention services and supports if they are going to be able to change their problem behavior and achieve success within and beyond school. Often these interventions are made out to be too labor-intensive, complex, intrusive, and costly. In fact, many of the intensive, evidence based interventions require low amounts of time from staff, cost little to no money to implement (e.g., self-monitoring, behavioral contracting, systematic school-home notes system, check in/check out, an so forth), and they are necessary for delivering effective behavior supports.” *RTI & Behavior*, p. 2 (emphasis added).

c. Some common mistakes in screening for behavioral intervention. “[A] seminal article written by James Kauffman in 1999 stated that **educators actually ‘prevent prevention’ of emotional and behavioral disorders** through well-intended efforts to guard students from the perceived negative effects of labeling and stigmatization associated with screening and identification. The problem in this way of thinking is that if students with behavior problems do not receive intervention and supports, then there is a good chance they will continue to display some degree of problem behavior throughout their lives.” *RTI & Behavior*, p. 17-18 (emphasis added).

“Unfortunately, research indicates that teachers are ‘imperfect tests’ when they are not given a systematic procedure to follow. This leaves the referral process susceptible to negative influences, such as reputational bias; racial or other stereotypes; personality conflicts; or individual teacher tolerance levels and personal agendas. There is a solution to these problems—a systematic process for screening all students according to data-based criteria.” *RTI & Behavior*, p. 18 (emphasis added).

2. Recognition that academic and behavioral struggles cannot be separated.

Behavior problems and academic troubles are linked. “If students are having problems with learning, they are, more likely than not (and sooner or later), going to present problems in behavior, and vice-versa. So the effort to screen and support early on both fronts becomes mutually serving for students, families, and educators.” *RTI & Behavior*, p. 3.

“More and more children and youth are bringing well-developed patterns of behavioral and academic adjustment problems to school. At-risk students often come to school with emotional and behavioral difficulties that interfere with their attempts to focus and learn. Others may have interpersonal issues with other students or educators that make concentrating on learning difficult. **Bullying, mean-spirited teasing, sexual harassment, and victimization are relatively common-place occurrences on school campuses, and these behaviors clearly compete with our schools’ mission of closing the achievement gap.**” *RTI & Behavior*, p. 2 (emphasis added).

Some traditional disciplinary strategies are counter-productive to both behavior management and academic improvement. “Research strongly suggests that if schools raise their level of achievement, behavior decreases; and, if schools work to decrease behavior problems, academics improve. So why not do both? Especially when we know that punishing the at-risk populations and using ‘discipline’ to systematically exclude them from schooling does not work. **Schools that use office referrals, out-of-school suspension, and expulsion—without a comprehensive system that teaches positive and expected behaviors and rewards the same—are shown to actually have higher rates of problem behavior and academic failure.** Specifically, chronic suspension and expulsion have detrimental effects on teacher-students relations, as well as on student morale; these kinds of responses leave the student with reduced motivation to maintain self-control in school, do not teach alternative ways to behave and have been shown in the research to have limited effect on

long-term behavioral adjustment. In fact, a history of chronic referrals, suspensions and expulsions from school is a known risk factor for academic failure, dropout, and delinquency.” *RTI & Behavior*, p. 1 (emphasis added).

The President’s Commission on Excellence in Special Education came to the same conclusion. “The Commission finds that locally driven, universal screening of young children is associated with better outcomes and results for all children. Effective and reliable screening of young children can identify those most at risk for later achievement and behavioral problems, including those most likely to be referred and placed in special education programs.” The President’s Commission Report on Excellence in Special Education, titled “A New Era: Revitalizing Special Education for Children and Their Families” [hereinafter “*President’s Commission Report*”], July 1, 2002, p. 22.

“The Commission found compelling research sponsored by OSEP on emotional and behavioral difficulties indicating that children at risk for these difficulties could also be identified through universal screening and more significant disabilities prevented through classroom-based approaches involving positive discipline and classroom management. The Commission also found that these approaches are widely used in some states and that they are at a stage where increased implementation is feasible. The Commission’s findings parallel the work of the National Research Council report on minority students in special education, which found that early screening followed by effective interventions in the classroom prevented many disabilities. **Most impressive were the results of large-scale clinical trials indicating that early intervention of reading skills in conjunction with positive behavior programs resulted in improved academic achievement and reduction in behavioral difficulties in high-risk, predominantly minority children.”** *President’s Commission Report*, p. 23 (emphasis added).

A couple of examples from the case law demonstrate that how schools address academic concerns can impact behavior, and how schools address behavior can impact academic performance.

Bad behavior management and discipline results in academic failure of gifted student. *School Administrative Unit #38*, 19 IDELR 186 (OCR 1992). Since violations of the ten-day rules occur based on the number of days of disciplinary removal, it seems obvious that someone needs to track the days as they are used. Unfortunately, since disciplinary sanctions are not always handed out by the same administrator, it is possible on a large campus, a busy campus, or a chaotic campus for a student to be removed many times with neither manifestation determination nor attempts by the IEP Team to provide appropriate supports for improved behavior. For example, a **student identified as having ADD and emotional problems was served under special education.** The school recognized that **the child was often defiant, angry, and confrontational.** The school placed the child (who apparently was quite gifted academically) in the regular classroom in the “high performance group” of students. There appear to be no modifications made to the regular classroom. **While the IEP indicated that a behavior intervention plan could be added, no formal plan was ever developed.** The child’s parents complained when the child failed English, math, social studies, and science. **Why did he fail? OCR found that the problem was not cognition, but being kicked out of class.** The student was repeatedly sent to the principal’s office (on average 7-8 times per week) for conduct such as yelling, hitting other students, disobeying teachers, etc.—conduct OCR identified as clearly arising from his disabilities. While teachers seemed eager to send him to the office, they did not keep records of why or when the student was sent. Campus administration disciplined the student, but kept no records of the discipline administered. OCR was concerned with several violations. First, despite the school’s expectation that the student would experience behavior problems, no formal plan was in place to address the child’s behaviors. Further, because they failed to keep disciplinary records, school officials never realized the amount of educational time that the child was missing due to his frequent trips to the office. Likewise, there was no evidence that the school had ever attempted to determine whether the behavior which made the child a frequent fixture in the principal’s office was

related to his disability. Bottom line: an academically-gifted student eligible entirely because of behaviors was denied education in violation of federal law because of the school's failure to address the behaviors.

Frustration with academics can give rise to behavior. *Schaumburg School District 54*, 53 IDELR 104 (SEA III, 2009). A case from Illinois involved an LRE dispute with respect to a student struggling in the grade-level curriculum. "The student currently receives significant accommodations in both language arts and math. Both KH and MF testified that the student's work is modified to her instructional level. The student is graded on the modified work, not on a seventh grade standard. Her grades reflect performance at her instructional level rather than on the seventh grade curriculum. The special education teacher also reported that the student completes her math work only when the 1:1 aide is with her. While these accommodations are somewhat tenuously maintaining the student in her current program, there was no evidence showing that the accommodations are helping her increase her reading and math skills. **To solely accommodate a student rather than provide the specialized instruction the student needs does not provide a free appropriate public education...."** (emphasis added).

"The student has received a significant number of disciplinary referrals, although these referrals are for minor infractions such as being in the hallway without a pass, refusing to follow expectations, and being disruptive.... **The guardian disputes the accuracy of these records, in part because she asserts that the student does not evidence these behavioral problems in the home.** The witness called by guardian, as well as the documentary evidence she introduced, attest to the student's good behavior in the home setting and with family friends. The hearing officer does not question the veracity of this documentation; however, **the preponderance of evidence adduced at the hearing shows that the student is struggling with frustration within the academic environment, in large part due to her significant reading and math deficits.**" (emphasis added).

The District's proposal for a more restrictive setting was upheld by the Hearing Officer.

3. Some thoughts on behavioral interventions

a. You can't just focus on punishment. "Punishing the at-risk student population and trying to exclude such students from schooling is not, by itself, an effective solution. **Schools that use out-of-school suspension and expulsion without a comprehensive system of teaching, and rewards for expected behavior are shown to actually have higher rates of truancy, vandalism, and fighting.** Patterns of chronic suspension and expulsion have detrimental effects on teacher-student relations, gives the student reduced motivation to maintain self-control in school, does not teach alternative ways to behave and has been shown in the research to have limited effects on long-term behavioral patterns. In fact, a history of chronic office referrals and suspension from school is a known risk factor for delinquency and school drop-out. *This is not an evidenced-based practice!*" *RTI & Behavior*, p. 36 (bold emphasis added).

"[T]hese ineffective practices may provide short-term relief for schools by eliminating the presenting problem for a brief period of time (i.e., remove the student via suspension or to self-contained special education classes), **but their long-term effects often include failure to focus on the administrative, teaching and management practices that either contribute to, or reduce school violence.**" *RTI & Behavior*, p. 37 (emphasis added).

"Evidence-based approaches to effective schoolwide discipline and academic support, for example, include: (a) systematic social skills instruction; (b) academic and curricular restructuring; (c) positive, behaviorally based interventions; (d) early screening and identification of students with behavior

problems and learning difficulties; (e) positive schoolwide discipline systems; (f) and timely and effective instruction.” *RTI & Behavior*, p. 37.

b. Once research-based interventions are determined, apply them thoughtfully and with fidelity. One can hardly expect to duplicate results from a research-based intervention without achieving fidelity with respect to implementation. That is, the positive results identified by the science require certain prerequisites to be met. Implementing an intervention with fidelity may involve staff training, low staff-student ratios, a particular environment be established or philosophy of interaction pursued, etc. Significant (or sometimes even minor) deviations from the requirements of the intervention may render it (and the data the intervention generates) useless, and valuable days of education may be wasted. Integrity matters.

Of course, just because an intervention has been proven effective does not mean that it will be successful with every child. If special education has taught us anything it is that “one-size-does-not-fit-all.” Interventions must be successfully implemented with an understanding of each child’s uniqueness.

B. Special education and Section 504 add aids and services for eligible students in addition to the campus’ efforts for all students.

Good early intervention and appropriate behavior management for all students does not mean that students will no longer qualify for special education due to emotional disturbance, nor does it mean that all misbehavior by special education students can be addressed with regular education interventions. The strategies and supports discussed above will, however, reduce the number of students who are referred to special education because of behavioral concerns, and will, in some cases, prevent small problems that can be addressed in regular education from growing into more serious problems that only special education can handle. Once a student is special education-eligible, IDEA controls both behavior management and restricts the use of removal days as a disciplinary sanction. Those concerns are addressed in the following pages, together with the natural extension of the philosophies discussed above as they apply to IDEA-eligible students.

1. Least Restrictive Environment (LRE)

IDEA’s presumption is that the IDEA student will be taught in the mainstream class with nondisabled peers. The statute is crystal clear on this issue. Congress intended through the IDEA to create in the mainstream classroom the “default placement” for the IDEA-eligible student.

“IN GENERAL.— To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A).

2. The Exception: Sometimes, because of the severity of the disability, FAPE cannot be delivered in the regular classroom. While it did not want separation of students with disabilities from their nondisabled peers, Congress recognized that in order to receive the necessary special education and related services, some eligible students would have to be educated outside the mainstream.

“The Conferees point out that while instruction may take place in such locations as classrooms, the child’s home, or hospitals and institutions, the delivery of such instruction must take place in a manner consistent with the requirements of law which provide that to the maximum extent

appropriate handicapped children must be educated with children who are not handicapped, and that handicapped children should be placed in special classes, separate schooling, or any other educational environment only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and supportive services cannot be achieved satisfactorily.” 24 U.S.C. §1401. (1978) Historical note.

School districts are required to create and maintain a continuum of educational placements, so that regardless of severity of disability, an appropriate public education can be offered. The instructional arrangement/setting for each IDEA-eligible student is determined by his IEP Team based upon his individual needs. The instructional arrangement is determined from among a continuum of educational placements. §300.115 of the federal regulations provides:

§300.115 Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

3. Should a more restrictive setting be necessary to meet the students needs, the IEP Team must be able to demonstrate that lesser restrictive settings are inappropriate, even with supplementary aids and services. The commentary to §300.551 of the 1999 federal regulations (a regulation identical to the 2006 version of §300.115 quoted above) makes clear that while the IEP Team does not have to wait for the student to fail in the less-restrictive setting before trying something more restrictive, it does need to seriously consider the situation.

“The regulations do not require that a child has to fail in the less restrictive options on the continuum before that child can be placed in a setting that is appropriate to his or her needs. Section 300.550(b)(2) of the regulations however, does require that the placement team **consider** whether the child can be educated in less restrictive settings with the use of appropriate supplementary aids and services and make a more restrictive placement only when they conclude that education in the less restrictive setting with appropriate supplementary aids and services cannot be achieved satisfactorily.” *DOE Commentary to Subpart E, §300.551 (1999)(emphasis added)*.

Language from a 2007 case is helpful here, as it looks at the goal of both the IEP and BIP. “As with an IEP, a perfectly designed intervention behavior plan or one designed to maximize a student’s potential is not the IDEA standard. Instead, the IDEA only requires an ‘appropriately’ designed plan, that is, one that, when necessary, will assist a student in maintaining his or her behavior so they can be successfully educated in the least restrictive environment.” *Student b/n/f Parent v. Katy ISD*, Docket No. 004-SE-0906 (SEA Tex. 2007)(Three other filings by the parent are consolidated with this case). Since the law favors the regular classroom, it should be no surprise that the further the student’s placement is from the regular classroom (in terms of restrictiveness) the less-favored the placement.

4. Supplementary aids and services. While IDEA requires the student with disability to be educated in the least restrictive environment, it recognizes that merely depositing a disabled student into a mainstream classroom without adequate supports will not provide the student with a free appropriate public education. To that end, IEP Teams are required to put together individualized plans based on the student’s assessment data that lay out the types of services and supports necessary for the student.

As these students' needs are likely behavioral, the IEP Team will focus a great deal of attention on behavior management. IDEA requires that attention.

5. Developing Behavior Intervention Plans (BIPs). The behavior intervention plan (BIP) sets forth the strategies, techniques, contingencies, and consequences that will be used to reduce the presentation of certain target or priority behaviors, as well as to promote the acquisition of adaptive behavioral competencies. The BIP and the IEP goals and objectives (areas in which we expect a child to make progress) should therefore work together. If the BIP targets a certain maladaptive behavior, the goals and objectives should address progress in extinguishing that particular behavior or in developing an appropriate alternative to that behavior. Many school district BIPs are simply lists of consequences without corresponding strategies to help children develop appropriate behaviors. All children need to be taught how to behave, as well as how not to behave. The best BIPs work concurrently on consequences for inappropriate behavior and techniques and strategies to promote appropriate behaviors. Thus, if a child tends to hit other children, the underlying problem may be inadequate conflict resolution skills. In this situation, the school should provide a consequence for engaging in a physical assault, but also work on developing more adaptive conflict resolution skills. A child will not develop these skills by the sole application of a consequence. He or she must be guided toward more appropriate means of either avoiding conflict situations or handling these situations when they arise.

What about Section 504? For students eligible under Section 504 who also receive a Section 504 Plan, Section 504 will provide services and accommodations to meet the Section 504 FAPE standard. The Section 504 FAPE (the Section 504 plan) is focused on leveling the playing field. "For the purpose of this subpart, the provision of an appropriate education is *the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sec. 104.34, 104.35, and 104.36.*" 34 CFR §104.33(b) (emphasis added).

C. Some common questions asked by educators about preparing for behavior

Question #4: When should the IEP Team consider a behavior intervention plan? When the student's behavior "impedes the child's learning or that of others" the IEP Team is required to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." §300.324(a)(2)(I).

A little commentary: There is no Section 504 regulatory language on when to consider a BIP. The IDEA language provides a clear and concise standard that can be utilized by the 504 Committee. Further, the IDEA trigger is based in part, on nondiscrimination principles, as it calls for consideration of a BIP when the student's behavior interferes with his learning (think of the statutory language of Section 504 prohibiting exclusion from participation or denial of benefit).

Question #5: Why does special ed want to do a Functional Behavioral Assessment (FBA) before we complete a behavior plan? The foundation of a good BIP is a Functional Behavioral Assessment (FBA). While not a required prerequisite to a BIP or BMP or behavior plan, the FBA seems a logical place to start. In fact, in response to a question with respect to social work services for students, the U.S. Department of Education voiced its support for FBAs in the following bit of commentary: "conducting a functional behavioral assessment typically precedes developing positive behavioral intervention strategies[.]" Federal Register, Vol. 71, No. 156, August 14, 2006, p. 46575 [hereinafter, "Federal Digest"]. We use evaluation data to determine eligibility and services. A good BIP will address the most problematic behaviors, and will attack them in a way that makes sense in light of the

uniqueness of the child. You have to know what the student does, where he does it, how often he does it, who else is around, and a lot of other facts if you want to significantly change behavior.

A little commentary: There is no Section 504 requirement to complete a functional behavioral assessment, but best practice would seem to include the FBA as part of the 504 Committee's efforts to manage behaviors.

A good FBA makes for a good BIP. *See, for example, Boston Public Schools*, 40 IDELR 108 (SEA Mass. 2003)(Hearing Officer found a FAPE violation when a school failed to appropriately respond to an attendance problem by a student with an emotional disturbance. "BPS did not conduct any formal assessment of this problem (such as a functional behavioral assessment (FBA)) so that it could develop a systematic way to address it, or alternatively did not establish consistent contact with Student's outside therapist. Such assessment was particularly important here because Student's combination of disabilities made it very difficult for her to discuss the anxiety and panic that impeded her attendance, even with McKinley Tech staff members with whom she had close relationships... As a result, Student's teachers and counselor at McKinley Tech did not know what student was experiencing." And presumably, could not possibly respond appropriately.). *See also, New York City Dept. Of Educ.*, 108 LRP 9562 (SEA N.Y. 2008)(Without an adequately developed FBA, the IEP Team could not develop an appropriate BIP).

Data matters when drafting a BIP. The student at issue in this 9th Circuit case was fifteen and eligible under the IDEA as a student with an emotional disturbance. Behaviors were problematic, including kicking another child, tackling a child to the ground, punching a child in the groin, and inappropriate touching and sexual harassment. In support of the IEP, the district provided scant detail as to the nature and impact of the student's behaviors. Under IDEA, this data is utilized as the basis of a required IEP statement on how the child's disability affects the child's involvement and progress in the general curriculum. Wrote the district court:

"Without that baseline of current performance and/or behavior, it is difficult to draft measurable and relevant annual goals. The District provided the following information regarding K.H.'s 'behaviors,' presumably based on K.H.'s disability: her behaviors 'resulted in short term suspensions,' K.H. had been physically and verbally aggressive, and K.H. 'had been involved in some sexual harassment incidents.' It was further noted that K.H. had difficulty maintaining friendships, verified by the behavioral inventory, and that people 'don't always enjoy [K.H.'s] company.' Finally, K.H.'s 'inappropriate behaviors interfere with her success in the classroom both socially and academically.'

The ALJ correctly found that the statement quoted above was insufficient to determine an accurate baseline of K.H.'s behaviors affected by her disability. **The information explaining K.H.'s current level of performance failed to provide any measurable level of problematic behaviors, including how many times K.H. had been suspended as a result of the behaviors associated with her disability, or how many instances and in what settings had K.H. been verbally aggressive.**" (Emphasis added).

Vagueness in the base data begat vagueness in the goals. The ALJ rejected two of the three goals listed in the student's IEP as unmeasurable. The first goal, "KH will exhibit appropriate work ethic and behaviors in school and home settings independently 90% of the time" was rejected by the Hearing Officer as vague and unmeasurable due to the use of the word "appropriate." At hearing, the person who drafted the language was unable to articulate its meaning. This goal likewise failed to include "any direction or specification for collecting and measuring data for behavior that occurred in the school setting." The third goal required that "KH will apply decision, along and problem solving techniques in school and home settings 90% of the time" (sic). "The ALJ noted,

and the hearing transcript supports the fact that each witness who testified about this goal had a different interpretation of the goal and the accompanying behavioral expectations. Moreover, the District admitted at the hearing that the reference to data from the home setting should not have been included as there is no reliable method to measure behavior and goals in the home setting. Finally, regarding what must be a typographical error, there was never any subsequent effort to correct or explain what the intent of the goal was.” Both the district court and Ninth Circuit agreed. *Bend-Lapine School District v. K.H.*, 43 IDELR 191 (D.C. Or. 2005), *affirmed*, 48 IDELR 33 (9th Cir. 2007).

Question #6: What are the required components of an FBA? There is no IDEA language on necessary components of a functional behavioral assessment. “The requirements for an FBA are not well defined by federal law or regulation; nevertheless, a proper FBA attempts to identify the likely triggers to and the appropriate interventions for problem behaviors. An FBA may, therefore, aid an IEP Team in developing appropriate IEPs.” *D.B. v. Houston ISD*, 48 IDELR 246, fn 6 (S.D. Tex. 2007). A good common sense definition of an FBA is an assessment of a student’s behavioral functioning, gleaned from observational data from sources knowledgeable about the student’s day-to-day behavior, that is reasonably calculated to assist the IEP team in developing an appropriate BIP. It is likely to include information regarding type of behaviors, frequency, severity, location, triggering factors, and previously attempted strategies, among others. There is no requirement that the FBA be conducted with assistance by a school psychologist, or that it be part of a psychological evaluation.

Question #7: Is an FBA ever required? Yes, the IEP Team is *required* to perform an FBA when during the manifestation determination, there is a finding that the behavior is related, and no FBA had been conducted prior to the behavior for which the MDR was held. §300.530(f)(1). **The IEP Team may be required to perform an FBA** (as appropriate) when the student is subjected to a removal longer than 10 days or a 45-day removal for special circumstances (drugs, weapons, serious bodily injury). §300.530(d)(ii). The “as appropriate” language allows the IEP Team to decide whether an FBA is necessary (presumably, whether additional data is needed upon which to base changes to the BIP to address the new behaviors). These are the sole regulatory triggers for an FBA, and the only references in the regs to the FBA.

A little commentary: The author believes that best practice is to conduct an FBA prior to the creation of a BIP, and thereafter, to update the FBA as needed to ensure its currency. A good BIP is unlikely without a good FBA.

Question #8: What are the required components of a Behavior Intervention Plan? A Texas case provides the answer. “With regard to the Petitioner’s arguments that somehow the behavior intervention plan was deficient because every contingency or reinforcer possible was not set forth under the plan, neither the IDEA nor the implementing regulations specify what the content of a proper behavior intervention plan should be. In 2004, the Seventh Circuit Court of Appeals refused ‘to create out of whole cloth’ any substantive standards for the structure of such plans. *See Alex R. V. Forrestville Valley Community Sch. Dist. #221*, 41 IDELR 146, 375 F.3d 603 (7th Cir. 2004). As the Court said in that case, ‘**the District’s behavioral intervention plan could not have fallen short of substantive criteria that do not exist...**’” *Student b/n/f Parent v. Katy ISD*, Docket No. 004-SE-0906 (SEA Tex. 2007)(Three other filings by the parent are consolidated with this case).

IDEA states that in considering special factors as part of developing IEPs, IEP Teams must address the need for behavioral interventions in students whose behavior impedes their learning or the learning of others. §300.324(a)(2)(I). But even after a BIP is developed, disputes often arise over (1) specific interventions called for in the BIP and (2) implementation of the BIP. The following cases illustrate these types of dispute.

A student with difficult and frequent behaviors requires a better than average BIP. The parents contested the appropriateness of a BIP of a student with ADHD and his placement in a self-contained “behavior improvement class.” The student exhibited extremely severe and disruptive behavior at school. The Hearing Officer found that the BIP was inappropriate because it contained no measurable criteria for determining progress on behavioral competencies. Moreover, there was no means for evaluating behavioral progress other than counting disciplinary referrals. The BIP also gave staff no guidelines for deciding which strategies to use from the BIP at any given time. Given the severity of the student’s behaviors, the BIP simply had to be better constructed than it was. *Matthew C. v. El Paso ISD*, Docket No. 174-SE-0299 (SEA Tex.1999).

It’s ok to change a BIP that doesn’t work anymore. The parents contested the removal of a behavior hierarchy from James’ BIP. The student, however, had learned to manipulate the behavior hierarchy portion of the BIP to his advantage. The Hearing Officer concluded that removing the hierarchy was appropriate since James was manipulating the hierarchy to the point that it was no longer appropriate to manage his behavior. *James G. v. Alief ISD*, Docket No. 279-SE-599 (SEA Tex.1999) (Part II).

Similarly, it’s NOT ok to recycle BIPs that failed. The parents of a 12-year-old student with an emotional disturbance challenged the appropriateness of the student’s BIP. A BIP, prepared on the standard District form, was developed and revised, but always contained similar consequences. Matthew’s behavioral problems continued (48 disciplinary referrals in one year), and culminated in a terroristic threat behavior which led to police intervention. The Hearing Officer concluded that the BIPs attempted for this student were very similar to each other, and never appeared to work to reduce inappropriate behavior. The Hearing Officer wrote that “if the same [BIP] with minor modifications has utilized year after year, but no behavior has been modified, it seems apparent that the [BIP] is not working.” In advising the school to renew attempts to develop an appropriate BIP, the Hearing Officer added that “perhaps the standard form could be put aside for this attempt.” *Matthew L. v. Fort Bend ISD*, Docket No. 234-SE-499 (SEA Tex. 1999).

Parents taking the student home is not behavior management. The Hearing Officer found the student’s BIP inappropriate. Despite the numerous continuing behaviors, the plan had not changed during the year. “While the Parent should be involved in the behavior plan, the Parent should not have the primary responsibility for disciplining her son at school. Likewise, the alternative of sending the Student home on a regular basis, as opposed to an occasional basis, does not address the Student’s behavioral needs at school and also deprives the student of instructional time.” *Little Rock Sch. Dist.*, 37 IDELR 30 (SEA Ark. 2002).

Timing matters. The need for a proper BIP existed long before the school made efforts to establish a plan for a student with stress-related behavior problems. For a significant time, the student exhibited behaviors that impeded his ability to benefit from his education, and there was no BIP. *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003).

Can the BIP include suspension? Yes. The Hearing Officer rejected the parents’ argument that the BIP was inappropriate because it called for consequences that included suspension. The BIP contained positive behavioral supports and strategies, and the use of consequences was not inappropriate, even for behavior related to disability. Moreover, the district had the right to make the final disciplinary decisions, even if the BIP called for consulting the parents. *In re: Student with a Disability*, 41 IDELR 115 (SEA Wis. 2003).

What if the behavior results in arrest? District failed to conduct an FBA and implement a BIP for an 11-year-old student with severe mental retardation, cerebral palsy, hearing loss, ADHD, and emotional disturbances who exhibited aggressive behaviors, which led to the student’s arrest.

“While the Hearing Officer agrees that arrest of an eleven year old child with serious disabilities was not appropriate under the circumstances, Petitioner’s arrest did not violate his rights under IDEA.” *Mobile County Bd. of Educ.*, 40 IDELR 226 (SEA Alabama 2004).

Was BIP appropriate if student still had to move to a more restricted setting? Yes. A BIP drafted to deal with the student’s escalating behaviors was appropriate, and included visual aids, sensory breaks, and manipulatives. The court noted that the IDEA did not include specific substantive requirements for BIPs. Even though the student became more violent, and eventually needed a more restrictive behavior unit, the court refused to find that the BIP was not appropriate. *Alex R. v. Forrestville Valley Community Unit Sch. Dist #221*, 41 IDELR 146 (7th Cir. 2004).

Question #9: Isn’t the Congress looking at restraint rules? Restraint is gaining national attention as a study by the General Accounting Office cited injuries, death and not much by way of consistent data collection or regulation of the practice. ED may see the need to intervene with regulations, and the Congress is already considering legislation to address the lack of restraint rules in many states. Note that at the time these materials were completed, these efforts to regulate restraint were stalled in the U.S. Senate.

Question #10: Is use of restraint evidence of failed behavior management? At least one advocacy organization has taken the position that when a school restrains a student, the restraint is evidence of failure. Had the IEP and behavior management plan been appropriate, they argue, no restraint would be required. While there is no dispute that restraint is an undesirable result, the advocacy position seems to ignore the very real possibility that not all behavior can be avoided by identifying antecedents, by de-escalation and other efforts. The duty of the schools has never been to extinguish behaviors, but to educate around them. The 8th Circuit provided this interesting language in response to a parent’s argument that the student did not make progress based on evidence of increased restraint use. “We of course very much regret that CJN was subject to an increased amount of restraint in his third-grade year, but that fact alone does not make his education inappropriate within the meaning of the IDEA... Because the appropriate use of restraint may help prevent bad behavior from escalating to a level where a suspension is required, we refuse to create a rule prohibiting its use, even if its frequency is increasing.” *CJN v. Minneapolis Public Schools*, 38 IDELR 208 (8th Cir. 2003). Of course, if the BIP is ignored and restraint is required, that would be a failure of behavior management.

An Important Final Reminder: Don’t be so distracted by maintaining behavior that education is forgotten. A special education case from Ohio makes the important point that while behavior can be a complicated piece of the educational puzzle for a student (here, a student with autism), the school cannot simply focus on behavior and ignore educational needs. “Though school system’s efforts to educate and train staff showed good faith and a sincere attempt to accommodate Student, those efforts fell short of providing Student with more than caretakers who were to restrain Student in case of an outburst. The record reflects confusion on the part of school officials as to who was to actually educate Student and how and when this would occur. Training was adequate to deal with outburst and restraint. Training was inadequate to deal with the actual education of an autistic child.” *Liberty Local School District*, 26 IDELR 497 (SEA OH. 1997). Since academic troubles can, and likely will, result in behavior problems, neglecting academics is bad behavior management.

And a quick summary... Common sense (and federal law) dictate that a student with complicated and persistent behaviors should have a more complex BIP than a student with behaviors that are easily managed. Likewise, when the plan isn’t working, the IEP Team or Section 504 Committee should review the situation and do something different. Finally, the BIP should be considered a “work in progress” as opposed to a plan etched in stone. Both the student’s condition and the demands of school performance will change over time, and that may require changes in the BIP as well.

III. IDEA & SECTION 504 DISCIPLINE: APPROPRIATELY RESPONDING TO BEHAVIOR

A. Follow the BIP

Since one of Congress' primary concerns when passing the IDEA was the lack of services provided to students because of disability and another was the exclusion of students from school because of disability, it's easy to conclude that Congress does not want kids excluded from school BECAUSE they did not receive adequate services to help them maintain good behavior. That's the same nondiscrimination thinking that underlies Section 504.

Question #11: So I guess that failing to provide a BIP where one is required is a problem? Yes. A Minnesota hearing officer ruled that bringing a paintball gun to school was in fact a manifestation of a 15-year-old student's ADHD, Bipolar Disorder, and ODD. Despite some level of planning on the part of the student, the hearing officer held that the student's disorders caused impulsivity and failure to consider consequences. An important element of the decision was the school's failure to have a BIP in place (despite the parent's request some four months prior to the incident at issue here.) *Ind. Sch. Dist. No. 279, Osseo Area Sch.*, 30 IDELR 645 (SEA Minn.1999).

Question #12: What if we created a BIP but didn't get it to everyone who needed to implement it? That's a problem. Should the district desire to place the student in AEP for a few weeks because of misbehavior, in addition to asking whether the behavior is related to disability, the IEP Team must also ask whether the behavior is directly related to failure to implement the IEP. For example, a 13-year-old student with an emotional disturbance and ADHD challenged his disciplinary placement in an alternative Student Learning & Guidance Center. His IEP called for resource placement, some regular classes, modifications, and a BIP. After being taken to the office for disrupting class, Gene hit a teacher with his arm as she redirected him away from a computer and he pulled his arm away from her. After Gene pulled a fire alarm in the alternative placement, the campus recommended expulsion. Neither Gene's individualized BIP nor his counseling was implemented at the Guidance Center. Without much discussion, the Hearing Officer held that the District failed to implement Gene's IEP at the Guidance Center due to the lack of BIP and counseling in that setting. The manifestation determination in the alternative setting was suspect in light of the failure to implement either a BIP or counseling there. One of the manifestation determination questions requires that the IEP Team determine if the IEP was properly implemented at the time of the offense (particularly with respect to behavioral components). If no BIP or counseling were being implemented, the IEP Team would appear to be required to find that the behavior was related to disability (thus rescinding the proposed expulsion). *See 20 U.S.C. §1415(k)(4). Gene F. v. Corpus Christi ISD*, Docket No. 036-SE-999 (SEA Tex. 2000).

B. Discipline of IDEA & Section 504 Students: Common questions from educators on disciplinary removals.

Question #13: What is a disciplinary removal? A disciplinary removal occurs when school personnel take a student away from his normal setting for discipline reasons. The most common example is a student suspended from school and sent home.

Question #14: Does every behavioral incident give rise to a removal? No, federal law provides for administrator's discretion in whether to pursue a removal. At the inception of the disciplinary process, a school administrator must decide whether to pursue a disciplinary removal in response to a student's behavioral offense. The final discipline provisions state that "school personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a student with a disability who violates a code of student conduct." §1415(k)(1)(A). The language may be in response to the advent of state or local "zero-tolerance" policies, under which school principals were required to order alternative placements or expulsions in response to certain student offenses without regard to any unique circumstances. IDEA now specifically allows a school administrator to consider

any unique circumstances, case-by-case, in deciding whether to order or recommend a long-term disciplinary removal of a student with a disability. A school principal may therefore decide not to recommend a long-term removal of a 7-year-old student with mental retardation who pushed his teacher while having a tantrum, even if a local “zero-tolerance” policy would otherwise mandate a long-term removal for assault on staff, without consideration of case-by-case circumstances.

Confusion surrounded this provision, as some feared it allowed school administrators to use case-by-case discretion in ordering disciplinary changes in placement without regard to the standard protections contained in the Act. The final regulations have alleviated this concern. The new regulation restates the language of the Act’s provision, but adds a comma clause that makes clear that in making case-by-case determinations and considering unique circumstances involving discipline, schools must nevertheless act in a manner “consistent with the other requirements of this section.” 34 C.F.R. §300.530(a). Thus, the regulation makes clear that the provision never was intended to allow an end-run around the otherwise applicable requirements of the law with respect to disciplinary changes in placement. The commentary states that “section 300.530(a), consistent with section 615(k)(1)(A) of the Act, clarifies that, on a case-by-case basis, school personnel may consider whether a change in placement, that is otherwise permitted under the disciplinary procedures, is appropriate and should occur. It does not authorize school personnel, on a case-by-case basis, to institute a change in placement that would be inconsistent with §300.530(b) through (i), including the requirement in paragraph (e) of this section regarding manifestation determinations.” 71 Federal Register No. 156, August 14, 2006, p. 46,714 (hereinafter, “Fed. Reg.”).

Additionally, the commentary informs schools that “factors such as a child’s disciplinary history, ability to understand consequences, expression of remorse, and supports provided to a child with a disability prior to the violation of a school code could be unique circumstances considered by school personnel in determining whether a disciplinary change in placement is appropriate for a child with a disability.” Fed. Reg. 46,714.

Question #15: What is a short-term disciplinary removal? A short-term disciplinary removal occurs when school personnel take a student away from his normal setting for disciplinary reasons for a period of less than ten days. The most common example is a student suspended from school and sent home for two to three days for a disciplinary infraction. A few types of school disciplinary actions require additional analysis.

In-school suspension not part of removal days. The ED reasserts the position it took in the 1999 commentary with respect to use of in-school suspension. It states that “it has been the Department’s long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in §300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy.” Fed. Reg. 46,715. *See also, Fox (MO) C-6 School District, 109 LRP 54751 (OCR 2009)(Letter of Finding suggests that the in-school suspension of a Section 504 student may not count toward the 10 cumulative days if the same conditions are met).* Consequently, time spent by the student in an ISS that does not meet the requirements count toward the ten cumulative day rule. For simplicity, ISS meeting these requirements will be referred to as “Smart ISS.”

So how have the hearing officers viewed “Smart ISS” cases? Hearing Officer and OCR decisions vary, and thus, the issue is heavily dependent on the particular view of the jurisdiction’s fact-finders. *See Pottstown School Dist., 29 IDELR 119, fn. 30 (SEA PA 1998)* (“suspensions that occur within the school do not necessarily count toward the ...period that a district cannot exceed before a change in placement occurs”); *Clear Creek (TX) Independent School Dist., 28 IDELR 1081 (OCR 1998)* (15 days of in-school suspension not counted in determining whether a “pattern of exclusion” change in

placement took place); *Daleville City Bd. of Educ.*, 28 IDELR 144 (SEA AL 1998) (in-school suspensions counted as suspension or removal days).

Unless the school's in-school suspension facility offers at least some instruction in the general curriculum, special education teachers provide required services, related services continue, and all IEP supplementary aids and services, including instructional modifications, are provided there, it is probably best to "count" in-school suspension days as short-term disciplinary removal days. The more continuity of educational services at the in-school suspension facility, the better your chance of successfully arguing that these are not true removal days. The more "traditional" your in-school suspension program (i.e. employee supervision, as opposed to instruction, while students allegedly work independently, or minimal services), the more likely a hearing officer will find that removals to your in-school suspension program in fact constitute disciplinary removals that "count" toward the 10-day marker.

To assess ISS removals, Hearing Officers focus on whether students are receiving all their regular and special education work, whether regular teachers are monitoring and dropping by periodically, whether special education instruction is provided (for students with resource and content mastery on their IEP), whether related services and modifications continue to be implemented, and, ultimately, whether the student made progress while at ISS.

Partial day suspensions. As with ISS, ED reasserts its 1999 position that "portions of a school day that a child had been suspended may be considered as a removal in determining whether there is a pattern of removals as defined in §300.536." Fed. Reg. 46,715. Thus, schools cannot ignore accumulations of partial-day suspensions in counting removals for purposes of the 10-day rule.

Bus suspensions. Here again, ED restates its longstanding position, stating that "whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation were a part of the child's IEP, a bus suspension would be treated as a suspension under §300.530 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where services will be delivered. If the bus transportation is not a part of the child's IEP, a bus suspension is not a suspension under §300.530. In those cases, the child and the child's parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus." Fed. Reg. 46,715. Thus, if special transportation, for example, is included as a related service on the IEP, a suspension from the bus would count as a suspension from school, unless the school provides some alternative means of transportation. If the child rides the regular bus, and that service is not a part of the IEP, then a bus suspension does not count as a suspension from school. The Department, however, cautions schools to address misbehavior on the bus as a part of the child's IEP. "Public agencies should consider whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child." Fed. Reg. 46,715.

Question #16: What is a long-term disciplinary removal? A long-term removal is one of over 10 consecutive school days, usually in the form of a removal to an interim alternative education setting or expulsion.

Question #17: Why does it matter whether the removal is short-term or long-term? IDEA 2004 reaffirms that the manifestation determination requirement and framework does not apply to situations where school personnel remove students for not more than 10 days (i.e., short-term removals). §615(k)(1)(E). As in 1997, the statute does not include a provision addressing accumulations of short-term removals of less than 10 days.

The 2006 regulations reiterate the longstanding authority of schools to undertake disciplinary removals of students with disabilities of less than 10 school days, and to repeat such removals for additional offenses, without following the change of placement procedures, as long as the accumulation of short-term removals does not constitute a change in placement. 34 C.F.R. §300.530(b)(1). The regulation also reasserts the provision in the 1999 regulations that requires the provision of educational services after a total of 10 removal days in a school year. 34 C.F.R. §300.530(b)(2); see also 34 C.F.R. §300.530(d) on the services requirement.

The commentary clarifies that the authority conferred upon schools would not allow “using repeated disciplinary removals of 10 school days or less as means of avoiding the change in placement options in §300.536.” Fed. Reg. 46,715. But, the commentary adds that “it is important for purposes of school safety and order to preserve the authority that school personnel have to be able to remove a child for a discipline infraction for a short period of time, even though the child already may have been removed for more than 10 school days in that school year, as long as the pattern of removals does not itself constitute a change in placement of the child.” *Id.* As to the provision reasserting the services requirement after a total 10 days of removal in a school year, the commentary states that “discipline must not be used as a means of disconnecting a child with a disability from education.” *Id.*

Question #18: Since the number of removal days is critical, shouldn't somebody be keeping track of the removal days? Yes. Since violations occur based on the number of days of disciplinary removal, it seems obvious that someone needs to track the days as they are used. *See previous discussion of School Administrative Unit #38*, 19 IDELR 186 (OCR 1992).

Question #19: So a disciplinary removal is not the same thing as a change of placement? Correct. A change of placement requires more than ten days of disciplinary removals. As in 1997, the 2004 statute does not include a provision addressing accumulations of short-term removals of less than 10 days. *See former 20 U.S.C. §1415(k)(1)(A)(i)*. Given that the Act also prohibits the Department of Education from promulgating any regulation that adds to the statutory requirements, a question emerged after reauthorization as to whether the long-standing guidance and 1999 regulation limiting accumulations of short-term removals constituting a pattern of exclusion would survive the reauthorization and rule-making process. *See former 34 C.F.R. §300.519(b)*. That regulation defined a disciplinary change of placement as including “a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.”

The 2006 regulation—Under new section 300.536, a change of placement on the basis of accumulated short-term removals occurs if—

- (1) the removal is for more than 10 consecutive school days; or
- (2) the child has been subjected to a series of removals that constitute a pattern—
 - (i) because the series of removals total more than 10 school days in a school year;
 - (ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

Thus, in addition to the familiar factors in §300.536(a)(2)(iii), the new provision requires analysis of the similarity of the behaviors that have led to the series of removals (*see discussion below at Question 21*). And, it appears that all the criteria in §300.536(a)(2) must be simultaneously present in order to support a finding that a series of removals amounts to a “pattern of exclusion” change in placement. In other words, a finding of a “pattern of exclusion” change in placement requires that (1) the series of removals

total over 10 school days, (2) the behaviors in the series be substantially similar, and (3) the old factors (length of removals, total removal, and proximity of removals) are indicative of a pattern. The new regulation is also cleaner and clearer in language. *See Fed. Reg. 46,729.*

Question #20: So schools have ten “free” removal days per student per school year? Yes. At the start of the school year, imagine the school is given 10 “free” removal days for each IDEA student. These days are “free” under IDEA because they can be used without an IEP team meeting, without a functional behavioral assessment (FBA), without a manifestation determination, without educational services, and basically, without worrying about any IDEA procedure or safeguard. They can be imposed as they would in the case of a similarly situated nondisabled student.

But, after the “free” days are used up with short-term removals, they will “cost” you in compliance with IDEA procedures and additional requirements. **For starters, for any short-term removal after the 10th, educational services must be provided to the student.** Moreover, at a certain point, accumulations of too many short-term removals will become a “pattern of exclusion” and will require compliance with the rules discussed below. In addition, ED also suggests that upon 10 total days of removal, the IEP team would be well-advised to conduct a FBA and develop a BIP (or revise an existing BIP). Also, even the most rule-conscientious campus is subject, after too many removals, to a finding that the excessive short-term removals are in fact a sign that the IEP is simply not working. These situations can thus evolve from pure discipline matters into actual denial-of-FAPE claims. Generally, it’s good advice for schools to limit forays into the over-10-total-school-days danger zone. And, obviously, the higher the number of short-term removals after the 10-day total is reached, the more precarious the legal position.

A little commentary: While the IDEA does not require IEP Team action with respect to behavior while within the “ten free days” it seems odd to waste the opportunity to better calibrate behavior management efforts before the school faces a pattern of exclusion. The best preventive measure in IDEA disciplinary matters is to convene an IEP team meeting *before* short-term removals add up to 10 total days. The IEP team can decide to conduct a FBA, develop a BIP, add counseling, evaluate the student further, vary other IEP services, change the student’s placement, or make other adjustments to the student’s program. The idea is to take action before a disciplinary issue becomes a problem. Hearing Officers tend to have little patience for schools that take no measures prior to removing the child a total of 10 days, but then seek to defend significant removals after the 10-day mark is reached.

Question #21: What’s the deal with “substantial similarity of behaviors in a series?” The commentary emphasizes the importance of determining whether the behaviors underlying a series of removals are substantially similar in nature. “We believe requiring the public agency to carefully review the child’s previous behaviors to determine whether the behaviors, taken cumulatively, are substantially similar is an important step in determining whether a series of removals of a child constitutes a change in placement, and is necessary to ensure that public agencies appropriately apply the change in placement provisions.” Fed. Reg. 46,729. The Department concedes, however, that the provision requires a “subjective” determination. *Id.* The commentary includes no examples of an application of this provision to assist in ascertaining the level of specificity required in the analysis.

A little commentary: This addition to the rule has an odd, perhaps unintended result. It would appear that the more distinct impairments suffered by the student resulting in behavior, or the more disparate the student’s behaviors, the more removal days possible before a pattern of exclusion. For some students, that may mean that the more disabled they are, the more they can be excluded from school. That seems an odd result in the context of a nondiscriminatory approach to discipline that focuses on preventing excessive removals due to disability-related behavior.

C. Discipline of IDEA & Section 504 Students: Common questions on manifestation determination.

Like IDEA '97, IDEA 2004 codified existing caselaw and ED guidance on when a manifestation determination must be made.

§300.530(e) *Manifestation determination.*

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(I) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

The regulations make clear that if any of the above standards were not met, the behavior must be considered a manifestation of the disability. If the review of the above standards reveals a deficiency in the IEP, the IEP Team "must take immediate steps to remedy those deficiencies."

Question #22: At what point should the school conduct a manifestation determination for a series of short-term removals? As the pattern of exclusion rule does not give the school the ability to determine *with much certainty* at what point after ten cumulative days of short-term removals a pattern of exclusion would be found for a particular student, schools should exercise caution here. The problem with series of short-term removals is that it is not precisely clear when the next short-term removal, once the school has already removed a student more than ten days in the school year, renders the overall series of removals a "pattern of exclusion." (*See the full rule reprinted above on page 19*).

The final regulation also clarifies that it is the school that must determine, on a case-by-case basis, whether a pattern of removals constitutes a change of placement. 34 C.F.R. §300.536(b)(1). It also confirms that the determination is subject to review through due process and judicial proceedings. 34 C.F.R. §300.536(b)(2); *see also* Fed. Reg. 46,729-30. Based on the foregoing regulatory language and commentary, some schools may limit themselves to no more than 10 total school days of short-term removals per school year, if at all possible. Clearly, the regulations allow for more than 10 short-term removal days in a school year, but the determination of when removals past the 10-day mark reach the point of becoming a "pattern" depends on multiple and potentially complicated factors. The spirit of the regulations, moreover, would rather support continued review and revision of positive behavioral interventions and supports, other changes to IEP services, or consideration of educational placement options, than engaging in continued short-term removals.

Question #23: When should the school conduct an MDR for a long-term removal? As soon as possible after the campus initiates a long-term disciplinary removal, an IEP team meeting must be convened to conduct a manifestation determination. The meeting must definitely take place before the long-term removal reaches its 10th consecutive day. The right to a manifestation determination in instances of threat of long-term removal is *the* primordial safeguard of the IDEA disciplinary procedures. It is a doctrine that was first espoused in court cases starting in the late-70's, later adopted

by the Department of Education as policy in the 1980's, and finally codified into IDEA and its regulations in the late 1990's.

Question #24: The MDR standard changed in 2004, does that affect my school? In 2004, the Congress undertook several revisions and reforms to the rules of discipline of students with disabilities. Part of the reforms touched on the requirement for manifestation determinations or manifestation determination reviews (MDRs) prior to long-term disciplinary removals of IDEA-eligible students. As seen below, the requirement itself remains, but Congress revised and simplifies the standard under which schools determine whether a behavior is related to disability. Although an apparently subtle change, the new formulation is in fact a significant departure from the prior manifestation determination inquiry.

Congress tightened the language and structure of the manifestation determination standard, in essence “raising the bar” of the standard required to show that a behavior is a manifestation of disability. If a school decides to change a student’s placement due to a disciplinary offense, “the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency), shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—

“if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.” 20 U.S.C. §615(k)(1)(E)(i).

The Conference Committee to IDEA 2004 stated that its intention in reforming the provision was that schools determine whether “the conduct in question was caused by, or has a direct and substantial relationship to, the child’s disability, and **is not an attenuated association, such as low self-esteem, to the child’s disability.**” *Conference Committee Report*, at 225, emphasis added. The commentary to the regulations cites and quotes this significant guidance. *See* Fed. Reg. 46,720. The final regulation at section 300.530(e) restates the statutory language without elaboration.

The ED also reads the reformed provision as an attempt to simplify the MDR process. The commentary to the regulation states “the revised manifestation determination provisions in section 615 of the Act provide a simplified, common-sense manifestation determination process that could be used by school personnel.” Fed. Reg. 46,720 (August 2006). The Conference Committee report on IDEA 2004 also provides additional guidance that Congress intended that the manifestation determination “**analyze the child’s behavior as demonstrated across settings and across time when determining whether the conduct in question is the direct result of the disability.**” *Committee Report*, at 224. The ED commentary to the regulations in fact quotes this very language. *See* Fed. Reg. 46, 720. This suggests that it is appropriate to examine patterns of behavior, the lack thereof, the setting where the behaviors take place or not, in making the determination. Ostensibly, if a behavior is caused by or directly related to disability, one should expect to see it across different settings and times.

A change with respect to Implementation of IEP vs. Appropriateness of IEP. Unlike the 1997 law, the new IDEA manifestation provision does not contain language about whether schools must examine the appropriateness of the child’s IEP while undertaking the manifestation determination. This raised questions about whether the omission was intentional and/or meaningful from a substantive standpoint. In response to comments on this point, the ED clarified that “the Act no longer requires that the appropriateness of the child’s IEP and placement be considered while making a manifestation determination.” Fed. Reg. 46,720. Rather, as part of the manifestation determination, schools must focus on whether there has been a failure of implementation of the IEP that directly resulted in the misbehavior. *Id.* And, if the manifestation determination decision-makers find that an implementation

failure has directly resulted in the behavior, a new subsection requires that the school take “immediate steps” to remedy the deficiencies. 34 C.F.R. §300.530(e)(3); *see also* Fed. Reg. 46,721.

Burden of proof in challenges to manifestation determinations. Several commenters asked ED to issue a regulation imposing the legal burden of proof on schools of showing a finding of “no link” was proper when parents challenge the determination. Referring to the Supreme Court’s decision in *Schaffer v. Weast*, 126 S.Ct. 528 (2005), the ED disagreed, stating that “the Supreme Court determined in *Schaffer* that the burden of proof ultimately is allocated to the moving party.” Fed. Reg. 46,724. Thus, the position of the Department is that a parent who challenges a school’s findings in a manifestation determination (i.e., the party seeking relief, or the “moving” party) bears the burden of proof in administrative proceedings under the IDEA per the *Schaffer* decision. This guidance will hopefully end the caselaw inconsistencies among hearing officers in assigning burden of proof in cases of challenges to manifestation determinations.

Prior to the 2006 regulations, with their accompanying clarifying commentary, there was some difference of opinion on the burden of proof formulation with respect to MDRs. Some hearing officers and review panels felt that the Supreme Court’s opinion in *Schaffer v. Weast*, which placed the burden of proof on parties challenging the existing educational program, was limited to challenges to IEPs. These administrative officers thus felt the issue of burden of proof in MDR challenges was an “open question.” See, e.g. *MaST Comm. Charter Sch.*, 47 IDELR 23 (SEA Pennsylvania 2006); *Philadelphia City Sch. Dist.*, 47 IDELR 56 at n. 32 (SEA Pennsylvania 2007). The majority opinion in *Schaffer*, however, expressly states that “[a]bsent some reason to believe that Congress intended otherwise...we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.” Moreover, the opinion questioned any burden of proof formulation that would presume an inappropriate IEP or violation of IDEA unless proven otherwise. Thus, other hearing officers interpreted *Schaffer* as clarifying the burden of proof issue in IDEA cases in general, since it placed the burden of persuasion on the party seeking relief or change in status quo. *Baltimore County Pub. Schs.*, 46 IDELR 179 (SEA MD. 2006)(noting that the IDEA provision on MDRs is silent on any unique treatment or shifting of burden of proof in MDR challenges); *Scituate Pub. Schs.*, 47 IDELR 113 at n. 4 (SEA MASS. 2007)(“party seeking relief with respect to a particular claim has the burden of persuasion regarding that claim”).

A little commentary: OCR typically applies the current IDEA manifestation determination standard to MDRs conducted for Section 504-eligible students.

Question #25: Who conducts the manifestation determination? While IDEA ’97 required the IEP team and other qualified personnel to conduct the manifestation determination, the new law states that **MDR is to be conducted by the school, the parent, and “relevant members” of the IEP team.** §1415(k)(1)(E)(i). There is no mention of a meeting requirement to actually undertake the MDR, although the law still requires the IEP team to convene to actually determine the interim alternative education setting and the services to be provided during the long-term removal. §1415(k)(2). Legislatively, the origin of this provision is likely related to other provisions of IDEA 2004 reflecting Congress’ concern over the high numbers of IEP team meetings that take qualified staff away from their respective instructional assignments. The final regulation implementing this provision restates the statutory language, and emphasizes that the school and parents mutually determine the relevant members of the IEP team that must make the MDR. 34 C.F.R. §300.530(e). **The flexibility offered by the Congress also means that there can be disputes over determining the “relevant” members of the IEP team.** For example, in the case of *Philadelphia City Sch. Dist.*, 47 IDELR 56 (SEA Pennsylvania 2007), an appellate panel overturned a school’s MDR, in part due to the fact that “the District did not provide the parents with the opportunity to engage in a mutual determination of relevant members of the Student’s IEP team.” See also, *Fitzgerald v. Fairfax Co. Sch. Bd.*, 50 IDELR 165 (E.D.Va. 2008)(court rejected parents’ argument that they had “equal right” to determine members of

MDR team or veto certain members); *In re: Student with a Disability*, 107 LRP 63721 (SEA Virginia 2007)(dispute over selection of relevant members, degree of participation). Is it clear how much opportunity must be provided to parents to provide input on members? What if there are disagreements on membership? To what degree must each member participate? To avoid problems and confusion, therefore, schools can choose continue to conduct MDRs in proper IEP team meetings. There are substantial questions about making MDRs without an IEP team meeting that are likely to be the subject of interesting litigation.

A little commentary: For the Section 504-eligible student, the Section 504 Committee will conduct the MDR.

Question #26: What happens when the IEP Team determines that a behavior is related? If the IEP team properly determines that a child’s behavior was related to disability, the IEP team is to “return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.” §1415(k)(1)(F)(iii). If the behavior is related, a long-term removal cannot take place (unless the 45-day exception, described below, applies). Thus, the quality of the manifestation determination is crucial to a long-term removal. IEP team members are well-advised to prepare and pre-staff for manifestation determinations. In cases of emotionally disturbed or behavior-disordered students, it’s also wise to consult with the evaluating psychologist about the determination before the meeting. The new regulations clarify that in situations of manifestation, IEP teams must conduct a functional behavioral assessment (FBA), if one has not been done already, and implement a behavior intervention plan (BIP). 34 C.F.R. §300.530(f)(1)(i). If a BIP is already a part of the child’s IEP, then the IEP team must review the BIP and “modify it, as necessary, to address the behavior.” 34 C.F.R. §300.530(f)(1)(ii).

Question #27: What happens when the IEP Team determines that a behavior is *not* related? If the IEP team properly determines that the behavior in question is **not** related to disability, then the student can be subjected to regular disciplinary procedures and regular removals, as in the case of a similarly-situated nondisabled student.

Question #28: Any special considerations for drugs, weapons or serious bodily injury offenses? Yes. Any of these three elements in an offense create special circumstances and treatment under IDEA discipline. The relevant regulation at §300.530 provides:

- (g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—
- (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
 - (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
 - (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

For drugs, weapons, or serious bodily injury offenses, proceed to manifestation determination IEP team meeting, but a 45-school-day removal to an alternative setting is available even if behavior is linked to disability. Congress has decided that even if a drug, weapon, or serious bodily injury offense is related to a special education student’s disability, the school can nevertheless remove the student to an alternative educational setting for a maximum of 45 school days. If, however, the offense is *not* related to disability, the student may be subjected to the school’s regular disciplinary procedures, including long-term AEP removal or expulsion (depending on local policy and state law). Schools should not

consider this an “automatic” removal, since a manifestation determination is nevertheless necessary, and the IEP team must also plan for serving the student in the disciplinary placement. **The new provision specifies that the 45-day removal timeline refers to “school days” rather than calendar days.** §1415(k)(1)(G); CRS Report, at 30. Ostensibly, this means that a 45-day removal begun at the end of a school year could be completed at the beginning of the next. Holidays and weekends would also not serve to reduce the actual time served in a disciplinary setting. A few additional details are provided below on each of the special circumstances.

Weapons. “Weapon” as used in the IDEA, adopts the language of 18 U.S.C. §930(g)(2) on “dangerous weapon.” The definition is as follows. “The term ‘dangerous weapon’ means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.”

Drugs. With respect to illegal drugs, IDEA provides this additional definition. “Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.” §300.530(i)(2). In addition to illegal drugs, the IDEA also applies special circumstance rules to “controlled substances,” meaning “a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act, 21 U.S.C. 812(c).

Serious bodily injury. As of July 1, 2005, causing serious bodily injury to a person is added to drugs and weapons as a behavior that can lead to 45-day removal even if related to disability. Note, however, that the law defines “serious bodily injury” in highly serious terms, referring to behavior that at least causes extreme pain, or results in disability. For a definition, IDEA looks to the use of the term “serious bodily injury” in 18 U.S.C. §1365(h)(3), a consumer protection law on tampering with consumer products. The definition is as follows:

- “(3) the term ‘serious bodily injury’ means bodily injury which involves—
- (A) a substantial risk of death;
 - (B) extreme physical pain;
 - (C) protracted and obvious disfigurement; or
 - (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty[.]”

Thus, it appears that the statute focuses only on the most severe types of assaults possible. Note that the next provision in the consumer law provides a definition of the term “bodily injury” which clearly distinguishes the serious (above) from the non-serious (things like “a cut, abrasion, bruise, burn, or disfigurement, physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.” 18 U.S.C. §1365(h)(4). The “serious bodily injury” standard is not reached by the typical school assault. *See for example, Bisbee Unified School District No. 2*, 54 IDELR 39 (SEA Az. 2010)(Evidence did not support that a principal kicked by a student with autism experienced “serious bodily injury” due to extreme physical pain. “Principal never stated in his written statement or testimony that he experienced extreme or severe pain in his knee, nor do his actions after the injury reveal it. He did not cry out, drop to the floor, become unconscious, call an ambulance or do anything else that one would expect when a person is in ‘extreme pain.’”); *See also, In Re Student with a Disability*, 110 LRP 99 (SEA Ka. 2009), *aff’d*, 54 IDELR 139)(After reviewing federal cases applying the serious bodily injury standard, the Hearing Officer made a comparison to the case at bar. “What these cases do make clear is that common, minor symptoms from four knuckle raps to the head by a small child, no matter the enlargement of his knuckles, while without doubt very uncomfortable, do not qualify as extreme physical pain under 18 U.S.C. 1365(h).” *But see, In re: Student with a Disability*, 52 IDELR 118 (SEA Va. 2008)(Security

officer kicked in the groin by student suffered serious bodily injury. No additional facts were provided).

A little commentary: To the author's knowledge, OCR has not, in published form, recognized the application of the IDEA's 45-day rule for weapons, drugs and serious bodily injury to students eligible under Section 504. Logic would dictate that (1) if students with greater entitlement under federal law (IDEA students) are subject to these removals under IDEA, and (2) IDEA rules of discipline are generally applied by OCR to Section 504 students, then (3) the 45-day rule should apply to Section 504 students as well. Talk with your school attorney about this issue to determine a course of action.

Question #29: Do students have to be eligible under IDEA to get MDR? No. By regulation at §300.534(a), MDR rights can arise prior to eligibility. "A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." The public agency is deemed to have knowledge when one of three factors is present:

"(b) *Basis of knowledge.* A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred

- (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
- (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency."

Rights will not arise where the parent has refused an evaluation, refused consent for special education services or has been determined ineligible for special education. §300.534(c).

Where the rights arise due to the public agency's knowledge, the school cannot change the student's placement without first conducting a manifestation determination. *See, for example, Karen Jackson v. Northwest Local School District*, 55 IDELR 71 (S.D. Oh. 2010)(Student's expulsion exceeding 10 days was in violation of IDEA as no manifestation determination occurred. The school referred the student to an outside mental health agency due to three major behaviors of concern a month before expelling her. The school was deemed to have knowledge that she was a student with a disability and was entitled to IDEA protections including MDR.) *See, also Maine School Administrative District 49*, 35 IDELR 174 (SEA Me. 2001) (A fourteen-year-old eighth grader with increasingly disruptive behaviors (truancy, oppositional behaviors, school failure, drug abuse, elopement) was referred to special education, but suspended for the remainder of the year for assaulting a teacher before the referral could even be completed. Although the referral to special education predated the incident by over one month, the removal occurred without the required manifestation determination. The hearing officer ordered, *inter alia*, that the IEP Team should consider compensatory education to assist the student to complete and get credit for her eighth grade year.

Question #30: How does a pending evaluation impact MDR for a student already in special education? As the decision to further evaluate an eligible student is made by the IEP Team, a pending evaluation will likely be viewed as the IEP Team's conclusion that it needs more data. A pending evaluation would seem to mean that the school does not have sufficient knowledge of the student's impairments either to determine eligibility or need for services. As a general rule, it would seem odd that a school, in that position, could simultaneously argue that it has sufficient data to conduct MDR,

but needs data to fulfill other unrelated functions (eligibility or services). *See, for example, Quincy (WA) School District No. 144-601, 52 IDELR 170 (OCR 2009)*(OCR finds a 504/ADA violation where a student with a learning disability was emergency expelled despite pending evaluation data with respect to possible ADHD. “OCR found that the school staff members who met after the student’s emergency expulsion and made the manifestation determination did not consider the pending medical evaluation regarding the possible relationship between the student’s medication and his behavior. Also missing from the team’s consideration was information as to the possibility that the student had ADHD or any evaluation of this possibility. Instead, the decision was based on whether the student’s misconduct was a manifestation of his SLD in reading comprehension. This ‘mere reflection’ of the student’s disability eligibility category is inconsistent with Section 504 and Title II. When the district later received medical information addressing the student’s behavior at school, the district did not convene a team to reconsider whether the behavior for which the student had been excluded from school was related to a disability and, instead, continued to exclude the student from his regular placement.”).

Question #31: How about some examples of manifestation determination from the cases? Ok.

Example 1: An Indiana hearing officer agreed with the school that a 14-year-old’s setting fire to a sweatshirt in a locker room was not related to his ADHD and depression. *Valparaiso Comm. Sch., 30 IDELR 1033 (SEA IN 1999)*. Although the hearing officer found that some of the student’s behaviors were directly to his disabilities, especially impulsivity and attention-getting behaviors, the degree of planning and coyness involved in the fire-setting (obtaining and bringing matches, lighter, and a flare to school) demonstrated the behavior was neither impulsive nor attention-seeking. The Hearing Officer reviewed the student’s disciplinary referrals over time and analyzed the locker room fire in context.

What related behaviors look like: “The student has a history of impulsive or habitual behaviors, best characterized as immediate responses to what the Student perceived to be verbal or physical confrontation. The Student does not possess enough internal controls to consistently interrupt these impulsive or habitual responses. To the extent the Student misinterprets the intentions and behaviors of others, such behaviors are related to the Student’s inappropriate feelings under normal circumstances....”

What unrelated behaviors look like: “At times the Student also exhibits inappropriate behavior which requires some degree of forethought and planning. These behaviors include exacting revenge on peers for their prior conduct and bringing inappropriate items such as rubber bands, matches, lighters and a flare to school. The occasional nature of these acts together with the Student’s inability to control other genuinely impulsive acts support the conclusion that these behaviors are not the result of any irresistible impulse connected with his emotional handicap[.]”

How the behavior at issue fits the pattern: “The Student showed no sign of emotional upset or animosity toward the owner of the sweatshirt on the day he lit the fire. The circumstances and location of the fire, together with the Student’s attempts to evade detection and hiding the matches indicate the fire was not set with the purpose of creating a disturbance and drawing attention to himself. The fact the Student brought matches and a flare to school indicate the Student was contemplating misbehavior. There was no convincing evidence to show this behavior was related to any feature of the Student’s emotional handicap[.]” *Id.*, at 1036.

Example 2: A plan undermines claims of impulsiveness. A student and a classmate talked and texted each other about sharing prescription sleep medication before taking pills at school, where they were caught. *San Diego Unified Sch. Dist., 109 LRP 54649 (SEA California 2009)*. The parents argued that the offense was an impulsive act related to their son’s ADHD. The hearing officer rejected the argument in light of the long-term arrangements of the students over the course of days. On the

impulsivity question, *see also*, *In re: Student with a Disability*, 109 LRP 56732 (SEA Virginia 2009)(student who shifted from one disruptive behavior to another over a period of time in class, and after correction, was not acting impulsively).

Example 3: Appeal of MDR as a disservice to student. A 10th grade student with learning disabilities involved in a gang jumped on the back of a staffperson who was trying to break up a gang fight. The student was not even attending class that day. *Muskegon Pub. Schs.*, 45 IDELR 261 (SEA Michigan 2006). The hearing officer admonished the parents, writing that “this matter should never have been the subject of a due process hearing.” He found that the parents did not offer any evidence to demonstrate a connection between the assault and the LDs, while noting that “the road to hearing in this matter has been very difficult and expensive.” “Learning disabled students and non-disabled students make bad decisions for many reasons. To excuse unacceptable conduct merely because a student has an unrelated disability does a disservice to the student.”

D. Discipline of IDEA Students: Common questions from educators on stay-put, services during disciplinary placement, reports to law enforcement, and the impact of revocation of consent.

Question #32: How does the IDEA’s “stay-put” rule work? The 2004 IDEA changed the application of the “stay-put” requirement with respect to changes in placement due to disciplinary action. Specifically, when an IDEA hearing is initiated to challenge a disciplinary action, either by the parent to challenge an action, or by a school to seek a removal to an interim disciplinary setting, “the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or the expiration of the disciplinary placement term, whichever occurs first.” §1415(k)(4)(A); CRS Report, at 31. Under previous law, unless the behavior involved a drug or weapon offense or the school sought a 45-day extraordinary removal from a hearing officer, the “stay-put” provision required that the student remain in his “pre-discipline” placement pending the decision of the hearing officer. *See* previous 20 U.S.C. §1415(k)(7)(A) & (B). The new law makes the disciplinary setting the “stay-put” placement if the parent requests a hearing to challenge the placement or manifestation determination.

In light of the change, the law also requires that this type of hearing be “expedited,” meaning that it take place within 20 school days and result in a decision within 10 school days thereafter. §1415(k)(4)(B). The likely policy source of the “stay-put” reform is two-fold: (1) legislative recognition of the need to enable schools to promote and maintain safer learning environments, and (2) the need to remove the incentive to litigation presented naturally by the prior application of the “stay-put” provision to discipline disputes. Simultaneously, however, the Congress acted to ensure that parents are afforded an expedited procedure to challenge school disciplinary changes in placement.

Question #33: Are educational services required during disciplinary removals? As in prior law, a finding that the behavior was not related to disability allows the school to follow and impose regular disciplinary procedures and removals, but while also continuing to provide students with a FAPE in the disciplinary setting with a focus on services enabling the child to participate in the general curriculum. §1415(k)(1)(C). The provision states that, irrespective of the manifestation determination, a child with a disability removed for disciplinary reasons must continue to receive educational services “so as to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.” §1415(k)(1)(D)(i).

The language was revised from stating that the services provided during removals must “enable the child to meet the goals” of the student’s IEP, to requiring that the services enable the student “to progress toward meeting the goals set out in the child’s IEP.” Compare §1415(k)(3)(B)(i) to new §1415(k)(1)(D)(i). Irrespective of the change, it appears that the statute continues to require a FAPE during long-term removals, although apparently allowing the provision of different types of services and accommodations than under the pre-discipline placement, as long as they lead to progress on the

IEP goals and allow appropriate participation in the general curriculum. Given the tightening of the manifestation determination standard, it should be expected that a greater number of students' behaviors will be found to not be a manifestation of disability. Thus, schools should also expect greater levels of scrutiny over the nature, quantity, and quality of services provided during the removal (also in light of the revision to the stay-put requirement in the context of discipline disputes, as discussed below).

The 2006 regulations restate the Act's requirement that students be provided a FAPE even during periods of long-term disciplinary removals. 34 C.F.R. §300.530(d)(1); §§1412(a)(1)(A), 1415(k)(1)(D)(i). **Indeed, the commentary plainly states “on the eleventh day cumulative day in a school year that a child with a disability is removed from the child’s current placement, and for any subsequent removals, educational services must be provided...” Fed. Reg. 46,717.**

ED takes the position that exact replication of services is neither required, nor, in many cases, possible. “We caution that we do not interpret “participate” to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities.” Fed. Reg. 46,716. Put in other words, ED interprets the statute as requiring that services during long-term disciplinary removals be provided in conformity with the child’s IEP “to the extent appropriate to the circumstances.” Id.

A “modified” disciplinary FAPE requirement. The ED clarifies that the concept of FAPE during a long-term disciplinary removal is a “modified” one, due to the potential differences in the settings and services available in disciplinary placements, as opposed to those on regular campuses. The commentary states that “while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child’s IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child’s IEP.” Fed. Reg. 46,716.

Individualized approach to during-discipline services. The ED highlights that the services provided to students with disabilities properly placed in disciplinary settings will vary depending on the students’ disabilities and needs. “Section 300.530(d) clarifies that decisions regarding the extent to which services would need to be provided and the amount of services that would be necessary to enable a child with a disability to appropriately participate in the general curriculum and progress toward achieving the goals on the child’s IEP may be different if the child is removed from his or her regular placement for a short period of time. For example, a child who is removed for a short period of time and who is performing at grade level may not need the same kind and amount of services to meet this standard as a child who is removed from his or her regular placement for 45 days under §300.530(g) or §300.532 and not performing at grade level.” Fed. Reg. 46, 716.

What about Section 504 students? The basic nondiscrimination rule will apply. To the extent that the school provides educational services to nondisabled students during disciplinary removals, Section 504 students should have equal access and benefit to educational services during disciplinary removals.

Question #34: Does IDEA address reports of criminal behavior to law enforcement? Yes. IDEA makes clear that schools may report criminal offenses committed by special education students at

school, and that IDEA grants such students no immunity for their potentially criminal conduct. 20 U.S.C. §1415(k)(6)(A). In addition, the provision calls for disclosure of educational records, after parental consent, to law enforcement after the report of a potential criminal offense at school. 20 U.S.C. §1415(k)(6)(B); *see* 34 C.F.R. §300.535(b)(2)(disclosure must comply with FERPA). The provision has been the subject of significant debate, in light of concerns over the “school-to-prison pipeline” phenomenon whereby substantial numbers of students with disabilities are first removed from school, get involved with juvenile authorities, and unfortunately in too many cases, proceed to the adult criminal justice system. Thus, the provision should be used in situations of true criminal offenses, and hopefully, after dialogue with local law enforcement authorities. School administrators, moreover, must ensure that resort to law enforcement occurs in a non-discriminatory fashion, for nondisabled and disabled students alike. In addition, staff must ensure that the student’s BIP, if any, is fully implemented before the police are called, if at all possible. Reports to law enforcement cannot be undertaken *instead* of complying with the requirements of a BIP or IEP. Moreover, administrators would be well-advised to get information from law enforcement authorities about exactly what type of conduct constitutes criminal conduct, and what offenses will normally lead to enforcement and which might not. State law may also provide guidance with respect to the types of criminal behaviors that schools should (or are required) to report to law enforcement.

Question #35: If a student’s parents have refused consent for the initial provision of special education services or have revoked consent for continued special education services, what is the impact on the student’s receipt of manifestation determination? ED commentary to the December 2008 regulations on revocation of consent provides:

“When a parent revokes consent for special education and related services under Sec. 300.300(b), the parent has refused services as described in Sec. 300.534(c)(1)(ii); therefore, **the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act’s discipline protections....** Students who are no longer receiving special education and related services due to the revocation of parental consent to the continued provision of special education and related services will be subject to the LEA’s discipline procedures without the discipline protections provided in the Act. However, students will continue to receive the full benefit of education provided by the LEA as long as they have not committed any disciplinary violations that affect access to education (e.g., violations that result in suspension). **We expect that parents will consider possible consequences of discipline procedures when making the decision to revoke consent for the provision of special education and related services.**” 73 Fed. Reg. 73,012 (December 1, 2008)(emphasis added).

Question #36: Does Section 504 have any unique disciplinary rules?

Essentially, IDEA rules and guidance apply equally to students eligible under §504 of the Rehabilitation Act, even if not eligible under IDEA. Indeed, the limitations on short-term removals and the doctrine of manifestation determination for long-term removals originated under §504. One area of divergence, however, is in the area of alcohol and drug offenses. Under §504, in cases of drug offenses, the §504 committee should first determine whether the student is a “current user” of drugs. Students eligible under §504 lose the right to a manifestation determination and due process hearing if they violate drug or alcohol rules and are determined to be “current users.” *See* 29 U.S.C. §706(8)(B)(iv). Thus, if there is evidence that the student is a current drug or alcohol user, the §504 committee can skip the manifestation determination, and the student is subject to the regular disciplinary process that would take place in the case of a drug or alcohol offense by a nondisabled student. If the committee does not believe that the student is a current user, it must proceed to make the manifestation determination. OCR has determined that mere possession is not itself evidence of current use of drugs or alcohol. *See, e.g.,* 17 IDLR 609 (OCR 1991).